In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1204

GENE GALL, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this federal gift tax case is whether gifts made by petitioners to trusts established for the benefit of their two minor children were present interests so as to qualify for the annual gift tax exclusion provided by Section 2503 of the Internal Revenue Code of 1954 (26 U.S.C.). The decision below held that the gifts were future interests and did not qualify for the exclusion.

The pertinent facts are as follows: On September 9, 1960, petitioners created two identical trusts, naming their five-year old daughter beneficiary of one trust and their four-year old daughter beneficiary of the other trust. Under the terms of the trusts, the trustee (Republic National Bank of Dallas) was given discretionary authority to distribute income and principal to the beneficiary or to apply those funds for her benefit, until the beneficiary reached the age of 21. At that time, the trusts were to terminate and the corpus was to be

distributed to the beneficiary (Pet. App. 25). In the event the beneficiary died before reaching the age of 21, the trust property was to be distributed to whomever the beneficiary appointed in her will. However, each trust further provided that the power of appointment could not be exercised until the beneficiary reached the age of 19 and that if the beneficiary died without exercising her power, the trust property would pass to the petitioners' surviving issue (Pet. App. 25-26).

During the years 1960 through 1966, petitioners made various gifts to the trusts, and filed gift tax returns claiming the annual $3,000 gift tax exclusion provided for by Section 2503 of the 1954 Code. On audit, the Commissioner disallowed the annual exclusions claimed by petitioners on the ground that their gifts to the trusts were future interests. In this refund suit, the district court upheld the Commissioner's determination (Pet. App. 33-41), and the court of appeals affirmed (Pet. App. 24-31).

The decision below correctly held that petitioners' gifts were future interests and did not qualify for the annual gift tax exclusion. Petitioners' principal argument (Pet. 11-14) is that the gifts qualify as present interests under the special rule applicable to gifts to minors provided by Section 2503(c). But as both courts below correctly concluded, Section 2503(c) is inapplicable.

Under that provision a gift to a person under 21 years of age will not be considered a gift of a future interest in property if the property and the income therefrom may be expended for the benefit of the donee during his minority, and will, to the extent not so expended, pass to the donee upon his attaining the age of 21, and to his estate, or to whomever he might appoint under a general power of appointment, in the event the donee dies before attaining the age of 21.

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Here, the trust property was not payable to the estate of the beneficiaries in the event either of them died before reaching the age of 21 nor were the gifts subject to a general testamentary power of appointment exercisable by the benficiaries. Thus, the seond condition of Section 2503(c) was not met.[1]

While the trust instruments nominally granted each beneficiary a power of appointment, they expressly limited the exercise of those powers by providing that the beneficiary could not exercise her power until she was more than 19 years old. Pursuant to Section 25.2503-4(b) of the applicable Treasury Regulations on Gift Taxes (1954 Code) (26 C.F.R.), this limitation constituted a substantial restriction on the beneficiary's power of appointment so as to render the trusts ineligible for the Section 2503(c) exception. The regulation provides that if the exercise of the donee's power of appointment is subject to any substantial restriction by the terms of the instrument of transfer, Section 2503(c) is inapplicable unless the restrictions imposed by the donor are no greater than those imposed by the applicable state law.

As the decision below observed (Pet. App. 30), under Texas law, any married or previously married female may execute a valid will and thereby exercise a tes-

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[1] *Rollman* v. *United States*, 342 F.2d 62 (Ct. Cl.), *Gilmore* v. *Commissioner*, 213 F.2d 520 (C.A. 6), and *Kieckhefer* v. *Commissioner*, 189 F.2d 118 (C.A. 7), relied upon by petitioner (Pet. 13), do not conflict with the decision below. *Rollman* involved the question whether the assignment of rental income to a trust which otherwise met the requirements of Section 2503(c) was a gift of a present interest. *Gilmore* involved a question whether the trustee's powers to invade corpus was any greater than that provided by Maryland law. Finally, the issue in *Kieckhefer* was whether a power of invasion by a guardian who had not been appointed at the time of the trust prevented gifts to the trust from qualifying as present interests.

tamentary power of appointment, regardless of her age. 17A Probate Code, Vernon's Tex. Civ. Stat. Ann., §57 (1956).[2] Thus, petitioners' daughters could have married prior to reaching the age of 19 and thereby have acquired legal capacity to exercise a testamentary power of appointment. Under the trust provisions, however, they were precluded from exercising their powers of appointment until they were over that age, even if they married below that age. The trust provisions were thus more restrictive than the applicable Texas law,[3] and under the applicable regulation, petitioners' gifts do not qualify for the gift tax exclusion.

Contrary to petitioners' further contention (Pet. 11), Section 25.2503-4(b) of the Regulations does not impose a stricter test than the statute. Indeed, if anything, the regulation is more lenient than a literal reading of Section 2503(c) would require, since the terms of the statute would foreclose present interest treatment for all gifts to minors where there was any restriction—imposed by state law or otherwise—on the minor's exercise of his power of appointment.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[2]Moreover, females between the ages of 14 and 18 may marry with parental consent in Texas, and females 18 and over are free to marry without parental consent. 13 Vernon's Tex. Civ. Stat. Ann., Arts. 4603 and 4605 (1960).

[3]Petitioners' contention (Pet. 14) that the more lenient requirements of Texas law must be read into the trust provisions is without merit. A grantor of a trust can impose any conditions or restrictions he wishes on the beneficiary's enjoyment of the trust property, except those conditions that are illegal or violative of public policy. See 1 Scott on *Trusts* §4, p. 46 (3d ed., 1967). Obviously, the age restrictions imposed by the trust instruments here were neither illegal nor contrary to Texas public policy.

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